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U. S. Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

A. G. NULSEN, JR., Executor of the Es-
tate of A. G. Nulsen, Deceased,

Petitioner
(Appellee Below),

vs.

NATIONAL LEAD COMPANY,
a Corporation,

Respondent
(Appellant Below).

No. **638**.....

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals for the
Eighth Circuit
and
BRIEF IN SUPPORT THEREOF.

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tate of A. G. Nulsen, Deceased,
Petitioner
(Appellee Below),

vs.

NATIONAL LEAD COMPANY,
a Corporation,

Respondent
(Appellant Below).

No.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan F. Stone, Chief Justice of the
Supreme Court of the United States of America, and
the Associate Justices:

Your petitioner, A. G. Nulsen, Jr., executor of the estate
of A. G. Nulsen, deceased, respectfully presents this his
petition for the issuance of a writ of certiorari directed
to the United States Circuit Court of Appeals for the
Eighth Circuit, and shows to this Honorable Court the
following:

I.

STATEMENT OF THE MATTER INVOLVED.

(a) **Prior Proceedings and Proceedings Below.**

Two prior lawsuits constitute the roots of the present
controversy, which stems from them. The first of these,
instituted in 1926, established a liability on the part of
A. G. Nulsen to one C. P. DeLore, under a contract entered
into between them in 1921. As Nulsen in that contract

had acted as agent for National Pigments and Chemical Company, he called upon both National Lead Company, respondent, and its wholly owned subsidiary, National Pigments and Chemical Company, to defend, but they refused. (The Lead Company had in the meanwhile acquired from Nulsen and his son all of the capital stock of the Pigments Company.) In the second suit, Nulsen obtained judgment against National Pigments and Chemical Company for the amount he had been obliged to pay DeLore, plus interest and expenses. Prior to that (but unknown to Nulsen) National Lead Company, causing the transfer to it of its subsidiary's assets, had assumed the obligations of the latter. After affirmance of this second judgment by the Supreme Court of Missouri (346 Mo. 1246), but before its satisfaction, National Lead Company began the present proceeding, to recover from Nulsen the amount of his judgment, the proceeds of which it attached in aid of service (Nulsen then being a nonresident of the state). The District Court, after trial and hearing without a jury, found all issues in favor of Nulsen, and awarded him judgment by way of counterclaim for the amount of the subsidiary's obligation which had been assumed. The Circuit Court of Appeals, however, in an opinion ignoring many of the facts found by the lower court, reversed outright the denial of a recovery to National Lead Company, and remanded with directions to enter judgment in its favor, and "for such other further proceedings as may be necessary to offset the judgment for the defendant and finally to terminate this litigation." Nulsen in the meanwhile had died, and his executor had been substituted as appellee.

Certain abbreviations in nomenclature will sometimes be used in what follows: By "Nulsen" will be meant petitioner's testator. Respondent will be referred to as the "Lead Company," while its subsidiary's name will be shortened to the "Pigments Company."

(b) The Facts and Issues.

The Lead Company's asserted cause of action against Nulsen was based, when reduced to its simplest elements, on the following facts: In the year 1923 it had purchased from Nulsen and his son, J. K. Nulsen, all of their shares of the capital stock of the Pigments Company. In the contract of purchase Nulsen and his son had guaranteed that on December 31, 1922, there were no liabilities of the Pigments Company not shown on the audit attached to said contract, and that if any liabilities of that company other than those shown on the audit should appear, then that they would assume and pay the same (R. 3).

This contract, by its terms, was made "for the benefit of the National Pigments and Chemical Company, as well as the party of the second part hereto (National Lead Company), and may be enforced by both the National Pigments and Chemical Company and the National Lead Company" (R. 42-43).

Subsequent to the consummation of this contract, Nulsen recovered his judgment against the Pigments Company in the sum of \$21,182.48, which bore interest from January 5, 1938, the date of its rendition in the Circuit Court of the City of St. Louis, Missouri. This judgment was later affirmed by the Supreme Court of the State of Missouri (346 Mo. 1246).

The contention of the Lead Company and the basis of its claim was that the judgment obtained by Nulsen against the Pigments Company was an obligation which arose out of a liability not shown on the audit referred to in the contract aforesaid; that it was, therefore, a liability which Nulsen had agreed he would assume and pay, and that having refused to do so, he had breached his contract, and that the Lead Company had been damaged thereby in the amount of such judgment and interest (R. 4).

Nulsen's contentions and defenses were that under the terms of the contract mentioned he had not agreed to assume and to pay the claim which was the basis of his suit against Pigments Company (R. 23-24), and, specifically, that this was so because such claim arose out of the failure of the Pigments Company to pay to one Casper P. DeLore a matured obligation, the existence of which as a contingent liability of said company, by reason of recited facts with respect thereto, was disclosed and shown in the audit, and was recognized by the parties (R. 24-27). Nulsen also contended that the judgment obtained by him against the Pigments Company was res judicata as to the claim asserted by the Lead Company, in that the contract relied upon had been made both for its benefit and that of the Pigments Company and was enforceable by both companies, and in that by reason of various factors involved in the relationship between the companies, there was an identity of interests in said companies and privity between them, and that thereby the Lead Company was bound and estopped by the judgment obtained by Nulsen against the Pigments Company from maintaining its action and from asserting the claim constituting the basis therefor (R. 27-28).

For a counterclaim Nulsen pleaded the recovery of the judgment aforesaid against the Pigments Company, its nonpayment, and the facts that while the suit which resulted in such judgment was pending all of the property and assets of the Pigments Company were acquired by the Lead Company, which assumed the former's liabilities, among which was the liability which had been asserted by Nulsen (R. 29).

Undisputed facts explanatory of the origin and nature of this liability, and which bore on the question of its disclosure by the audit, appear from documentary evidence submitted at the trial. Such evidence included statements in the audit itself (R. 47-48), the petition in the suit of Nulsen against the Pigments Company (R. 64),

the DeLore-Nulsen agreement of July 30, 1921, filed therewith (R. 68); the answer of defendant therein (R. 75); the St. Louis Circuit Court judgment therein (R. 218), and the Missouri Supreme Court order of affirmance (R. 217) and opinion on appeal (R. 96). Such facts are recited in paragraph 2 of the District Court's findings (R. 223) as follows:

“2.

“In 1920, A. G. Nulsen and members of his family were the owners of the National Pigments and Chemical Company, a corporation, hereafter referred to as the Pigments Company. A Mr. DeLore was the owner of the J. C. Finck Mineral Milling Company and the DeLore Baryta Company, hereinafter referred to collectively as the DeLore Properties. Nulsen, acting for the Pigments Company, purchased the DeLore Properties from DeLore. The DeLore Properties were merged with and became a part of the Pigments Company. In connection with that purchase Nulsen, as the agent of the Pigments Company, made an agreement with DeLore that if a certain tax liability of his properties was finally determined to be less than \$35,000.00 he, DeLore, would be paid one-half of the difference between the amount of the tax and \$35,000.00. The amount of the tax was substantially less than \$35,000.00. Nulsen refused to pay DeLore one-half of the difference and was sued therefor. That action was filed on December 29, 1926, and final judgment for DeLore was entered December 30, 1930. In the meantime, on May 14, 1923, Nulsen had sold the Pigments Company, including the DeLore Properties, to the National Lead Company. He notified the Lead Company of the DeLore claim on November 23, 1925, and formally notified the Pigments Company of that action on November 1, 1928, and requested it to defend that action. The same attorney, acting for both the Lead Company and the Pigments Company, denied any responsibility arising out of the Nulsen-DeLore transaction. The Pigments Company contended that Nulsen had not acted as its agent in the DeLore transaction. DeLore

recovered, Nulsen paid the judgment and sued the Pigments Company for the amount he was compelled to pay DeLore. The Lead Company was not joined in the latter action. Nulsen recovered in his action against the Pigments Company, and on appeal the judgment was affirmed by the Missouri Supreme Court. See *Nulsen v. Pigments Company*, 356 Mo. 1246, 145 S. W. (2d) 410."

Other facts in evidence, tending to defeat the Lead Company's contentions and to support those of Nulsen, are set out under findings 7 and 8 of the trial court (R. 225-228), and these are here reproduced as a summary thereof (references to pages of the record where the supporting facts appear have been added):

"7.

"The plaintiff's claim against the defendant is predicated upon the assumption that the Pigments Company's liability to DeLore was not disclosed by the audit attached to the indemnity contract of May 23, 1923, between Nulsen and the Lead Company.

"The audit contained the following references to the DeLore claim:

" 'It should be observed here that Albert G. Nulsen in these negotiations (for the purchase of the DeLore properties) acted as the Agent of the National Pigments and Chemical Company' (R. 48).

* * * * *

" 'The returns of the J. C. Finck Mineral Milling Company (one of the DeLore properties) for the years 1917 forward are subject to final determination by the Department; however, the reserve for possible further assessment in this respect would appear to be amply provided for' (R. 56).

" 'Reserves:

For federal income taxes of prior
years of constituent companies...\$27,057.92.'
(R. 57.)

* * * * *

“The balance due at December 31, 1922, on purchase money obligations, arising from the acquisition of the Finek and DeLore Companies, is made up as follows:

Payable to

Casper P. DeLore—

Due January 10, 1923....	\$50,000.00	
January 10, 1924....	50,000.00	
January 10, 1925....	50,000.00	\$150,000.00

Albert G. Nulsen—

Due January 10, 1923....	\$10,000.00	
Due January 10, 1924....	10,000.00	
Due January 10, 1925....	10,000.00	30,000.00

Total.....		\$180,000.00.
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(R. 55.)

“Subsequent to the execution of the contract of May 23, 1923, the Lead Company’s counsel, on September 25, 1923, made inquiry of the accountants who had made the audit attached to the contract, requesting that further information be given concerning the DeLore transaction (R. 166). Pursuant to that inquiry, in the supplemental audit furnished the Lead Company by the accountants (made for the primary purpose of determining the exact amount to be paid by the Lead Company to Nulsen), was included the following requested information concerning the DeLore transaction:

“‘In connection with the Federal income taxes of prior years of the constituent companies, we would draw your attention to the fact that the sum of \$45,000.00 was originally set aside to cover the possible liability in respect of this item. The division of this amount as between the companies, and the subsequent outlays which the present company was obliged to undertake, are shown in the following summary:

	Nulsen Corporation (Old Company)	J. C. Finck Mineral Milling Company
Original provision as of December 31, 1920.....	\$10,000.00	\$35,000.00
Deduct—Payments made		
On account of the year 1920	\$1,680.95	\$12,873.93
On account of prior years.		205.58
In full settlement of the years to 1919, inclusive.	3,181.62
	<u>4,862.57</u>	<u>13,079.51</u>
Balance, per attached Balance Sheet	5,137.43	\$21,920.49

“ ‘The returns of the J. C. Finck Mineral Milling Company are subject to final determination by the Bureau of Internal Revenue, and while no larger assessment than the amount set up is anticipated, it should be borne in mind that one-half of any excess or insufficiency in this sum is payable to or by Mr. D. P. DeLore, as the case may be. This is in accordance with one of the provisions of the agreement, dated July 30, 1921, whereby your company acquired the Finck and DeLore properties. The taxes for all companies for the year 1920 have been duly paid on the basis of the returns as filed’ (R. 135-136).

* * * * *

“ ‘Reserves:

For Federal income taxes of prior
years of constituent companies...\$27,057.92.’
(R. 139.)

“The above-quoted explanation of the contingent tax liability was given to the National Lead Company prior to the final settlement for the purchase of the Pigments Company, amounting to much more than the DeLore claim, was paid to Nulsen by the Lead Company (R. 116).

“8.

“The information contained in the original audit, supplemented and explained in the supplementary audit, disclosed the existence and nature of the DeLore claim and the responsibility of the Pigments Company for the payment of that claim, although at the time of

the closing of the contract for the purchase of the Pigments Company, the amount of the Finck Mineral Milling Company's tax liability to the Government had not yet been determined. Hence, at the time of the final settlement between the Lead Company and Nulsen under the contract of May 14, 1923, the possibility of the Pigments Company owing DeLore was apparent, but it had not at that time been actually determined whether DeLore owed the Pigments Company, or whether the Pigments Company owed DeLore. Likewise, for the same reasons (the non-determination of the tax liability) the amount of the obligation of the Pigments Company to DeLore had not been determined at the time of the final settlement between Nulsen and the Lead Company."

As to the facts bearing upon the defense of res judicata and estoppel by judgment, and upon the issue presented by Nulsen's counterclaim below, we reproduce here, as an accurate statement of such facts, paragraph 6 of the District Court's findings (R. 225), in which we have inserted appropriate references to the record to show the basis for the statements made:

"6.

"On October 31, 1936, the Lead Company being the owner of practically all of the capital stock of the Pigments Company caused a contract to be executed, the effect of which was to terminate the active existence of the Pigments Company and liquidate that company (R. 180, 182). The Pigments Company corporation has not been completely dissolved (R. 191), but its business affairs have been administered by the Lead Company since its purchase by the Lead Company in 1923. Since the contract of October 31, 1936, the Pigments Company has been operated by the Lead Company as a division of the Lead Company (R. 198). The same parties who are named as officers of the Pigments Company are officers of the Lead Company (R. 192-196). The Lead Company's attorney repre-

sented the Pigments Company in the trial of the action by Nulsen against the Pigments Company (R. 157-158, 197). The Lead Company conducted the defense in the action by Nulsen against the Pigments Company in April, 1937 (R. 157-158). As noted, the Lead Company had been the complete owner of the Pigments Company and all of its property since May, 1923. The Lead Company, in making the contract of indemnity with Nulsen in 1923, wrote into that contract the express provision that the indemnity should extend to the benefit of the Pigments Company (R. 43). All of these conditions existed prior to the trial of the action by Nulsen against the Pigments Company in 1937. The Lead Company in its report to the Securities Exchange Commission on July 1, 1937, listed the National Pigments Company corporation as a wholly-owned subsidiary, and that it had been liquidated on October 31, 1936" (R. 213).

It was upon the findings which we have quoted, and others, that the conclusions of the District Judge were based. These included conclusions that the action by Nulsen against the Pigments Company was in law and in fact an action between Nulsen and the Lead Company (II, R. 228); that the contract of indemnity relied upon as the basis for the Lead Company's cause of action could and should have been interposed as a defense in the former action, and the Lead Company's failure to so interpose it rendered the final judgment in the former action res judicata as to the subject matter of that defense (III, R. 229); that the rights of the parties had been finally adjudicated in the former action, reported as affirmed in 346 Mo. 1246, 145 S. W. (2d) 410, and that the indemnity agreement might not now be made the basis of a separate cause of action (IV, R. 229); that the contingent liability of the Pigments Company to DeLore was sufficiently disclosed to the Lead Company prior to its final settlement of the contract between it and Nulsen to put it on notice as to the

nature and possible extent of the DeLore claim, and hence a recovery by the Lead Company from Nulsen was not authorized upon the theory that such existence was not disclosed by the audit (V, R. 229); and that Nulsen was entitled to judgment against the Lead Company for the sum of \$21,184.48, with interest at 6 per cent per annum from January 5, 1938 (VII, R. 229).

As heretofore indicated, the Circuit Court of Appeals, in reversing the District Court, ignored entirely many of the facts found by the latter, and disregarded the conclusions which had been based on those facts. Particularly was this true concerning the facts relating to the Lead Company's assumption in 1936 of its subsidiary's obligations and to its conduct of the defense of Nulsen's suit, and concerning the legal effect to be given such facts.

The Circuit Court of Appeals in its opinion, filed October 29, 1942 (R. 247), omitted any reference to various controlling decisions of the Missouri appellate courts on the questions of the effect to be given the interpretation placed by the parties on their contract, and of the effect to be given to the Lead Company's failure to assert, in the defense of Nulsen's suit against the Pigments Company, a plea that Nulsen was estopped by his contract from litigating that claim.

In the opinion it was ruled, among other things, and in effect: (1) That the facts and circumstances detailed in paragraphs 7 and 8 of the District Court's findings were not sufficient to support Nulsen's defense on the merits (R. 252), and (2) that the defense of *res judicata* or estoppel by judgment was not good because: (a) The issue of Nulsen's guarantee against liabilities not shown on the audit was not a point "actually litigated and determined" in his suit against the Pigments Company (R. 257); (b) the pleading of that issue by the Pigments Company in the earlier action would have been "an affirmative defense in the nature of a counterclaim or of a plea in confession and

avoidance" (R. 261), a plea inconsistent with the defendant's general denial and not good under Missouri law (R. 262); (c) there was no privity between the Lead and the Pigments Companies (R. 258); and (d) notwithstanding that the Lead Company controlled the defense of Nulsen's action against the Pigments Company, the two corporate entities could not be so disregarded as to bind the former by the judgment against the latter (R. 258-259).

On November 13, 1942, petitioner filed a petition for rehearing in the Circuit Court of Appeals (R. 265-285). In this attention was called to the several instances wherein important and undisputed facts, and controlling principles of law established by Missouri decisions, had been ignored and disregarded by the opinion. Numerous errors of omission and commission, some of the latter glaring, were urged.

The petition for rehearing was denied by the Court on November 23, 1942 (R. 287).

II.

BASIS OF THIS COURT'S JURISDICTION.

(a) This Court has jurisdiction to review the judgment of the United States Circuit Court of Appeals, under the authority of Section 240 of the Judicial Code, as amended, now being 28 U. S. C., Sec. 347.

(b) The date of the judgment of the Circuit Court of Appeals was October 29, 1942, when its opinion was entered (R. 247), and the date when such judgment became final (subject to reversal here) was November 23, 1942, when the petition for rehearing was denied (R. 287). The date of application for certiorari may be taken as the date of the filing of this petition in the office of the Clerk of this Court.

(c) The cases believed to sustain the jurisdiction of this Court are:

Magnum Import Co. v. Coty, 262 U. S. 159, 67 L. Ed. 922;

Erie R. R. Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188.

III.

THE QUESTIONS PRESENTED.

(a) Prior to the consummation of its contract with Nulsen, the Lead Company requested (R. 118, 166) and was given (R. 116, 135-136) additional information bearing upon the DeLore transaction with Nulsen as agent for the Pigments Company, and the reserves for taxes involved therein, both of which matters had been referred to in the audit attached to their contract (R. 48, 56, 57). This information disclosed that if existing tax liabilities of a constituent company should be less than the \$21,-920.49 reserve set up therefor in the original audit (with the stock purchased by the Lead Company increased in value to that extent), then the Lead Company would be liable to DeLore for one-half the difference, that is, it would be entitled to retain only one-half the amount of the saving in the reserve. In view of such facts, which were undisputed, may not the Lead Company be said to have recognized the contingent liability to DeLore as shown by the audit, and thereby to be precluded from asserting that it was not so shown?

(b) Being in control of the defense of Nulsen's suit against the Pigments Company (R. 157-158, 197), and having theretofore assumed that company's liabilities and caused its liquidation (R. 180, 182), was not the Lead Company bound by the judgment against its subsidiary, in whose name the suit was defended?

(c) With this litigation's history, and despite the fact that in the two actions different claims are presented (which is necessarily so), does not the principle apply that a former judgment is a bar, not only as to what was offered and received to defeat the claim therein involved, but also as to any other admissible matter which might have been offered for that purpose?

(d) By express adjudication of the Missouri Supreme Court (*Nulsen v. Pigments Company*, 346 Mo., l. c. 1253), the defense on behalf of the Pigments Company that Nulsen guaranteed the nonexistence of the liability there sued on was one of **estoppel by contract**. Could not such defense, consistently with a general denial of liability, have been affirmatively pleaded?

IV.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The impelling reason why this Court should provide means for reviewing the decision of the Circuit Court of Appeals is that such decision has so ruled several important questions involved in the doctrines of *res judicata* and of merger and estoppel by judgment as to present serious and disturbing conflicts with applicable controlling decisions of the Missouri courts. The opinion, if allowed to stand, would affect not only the rights and obligations of the parties in this private controversy, itself lacking in public or widespread interest, but it must lead to confusion, uncertainty and unsettlement in many matters of very great importance.

We draw attention specifically in this regard to:

(1) The accurate declaration that: "Parties, who having a right to do so control the litigation, are regarded as parties of record" (R. 257), followed, however, by the appli-

cation of the principle that corporate entities may be disregarded only to prevent perpetration of fraud (R. 258-259). Such principle, under the law in Missouri, as elsewhere, has no application where the matter is that of binding one who defends in the name of another;

(2) The application of the general principle that where the demands are different, in two actions, the first judgment is conclusive only of issues actually litigated (R. 257, 260), without recognizing the exception that an available defense to one action may not be later asserted as a basis for defeating a recovery on the first judgment.

(3) The holdings of the opinion (R. 260) that the Lead Company's "cause of action in the present case . . . was neither pertinent nor directly defensive to the claim made by Nulsen in the former case," and that (R. 261) "the plea (of Nulsen's guarantee contract) would have been an affirmative defense in the nature of a counterclaim or of a plea in confession and avoidance," these in the face of the Missouri Supreme Court's declaration of the law that such plea would have been one of estoppel by contract (*Nulsen v. Pigments Company*, 346 Mo., l. e. 1253).

In addition to the matter of the several conflicts with Missouri decisions, the opinion of the Court of Appeals presents in the particulars mentioned departures from firmly established doctrines approved and followed by this Court, by other Circuit Courts of Appeal, and previously by the Eighth Circuit Court.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case

numbered and entitled on its docket "No. 12,303, National Lead Company, a corporation, appellant, vs. A. G. Nulsen, Executor of the Estate of A. G. Nulsen, deceased, appellee," and that the said judgment of the Circuit Court of Appeals for the Eighth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

A. G. NULSEN, JR.,
Executor of the Estate of A. G. Nulsen,
deceased,

By RICHARD S. BULL,
Counsel for Petitioner.

Of Counsel:

EMMET T. CARTER,
ORLA M. HILL.

